

**BEFORE THE APPEALS BOARD
FOR THE
KANSAS DIVISION OF WORKERS COMPENSATION**

RICK D. HILLS

Claimant

VS.

STARFORCE NATIONAL LLC

Respondent

AND

ACCIDENT FUND INSURANCE CO.

Insurance Carrier

Docket No. 1,023,736

ORDER

Claimant requested review of the February 13, 2008 Review and Modification Order (Order) by Special Administrative Law Judge (SALJ) Marvin Appling. The Board heard oral argument on June 3, 2008.

APPEARANCES

William L. Phalen, of Pittsburg, Kansas, appeared for the claimant. Jeffrey R. Brewer, of Wichita, Kansas, appeared for respondent and its insurance carrier (respondent).

RECORD AND STIPULATIONS

The Order does not contain an itemization of the record. But at oral argument the parties agreed that the record contains all of the items referenced in the Original Award issued on June 6, 2007 as well as the August 8, 2007 hearing that was held in connection with the claimant's Review and Modification request and the written stipulation entered into by the parties and relating to claimant's post-injury employment and subsequent termination.

ISSUES

The SALJ concluded that the claimant was not entitled to the 61.5 percent work disability originally awarded in this claim because he believed claimant was purposely “under-employed simply to draw his work disability”. Thus he was only permitted to recover his 10 percent functional impairment.¹

The claimant requests review of the SALJ’s denial of his request for a modification of the June 6, 2007 Award. Claimant maintains he was terminated from his post-injury employment due to a market reversal and since his termination, he has put forth a good faith effort to find another job but to date, has been unsuccessful. Thus, claimant believes he is entitled to the 61.5 percent work disability granted to him in the original Award, which was not appealed.

Respondent argues that the SALJ’s Order should be affirmed in all respects as the claimant was fired for poor job performance and not because he could no longer do the job because of his injury or because business was slow. Thus, his wage loss is not causally connected to his work injury. In addition, respondent argues that under the applicable post award statute, K.S.A. 44-528(b), claimant has the capacity to earn wages equal to or greater than his pre-injury wage. Thus, he is not entitled to that portion of his work disability award.

FINDINGS OF FACT AND CONCLUSIONS OF LAW

Having reviewed the evidentiary record filed herein, the stipulations of the parties, and having considered the parties’ briefs and oral arguments, the Board makes the following findings of fact and conclusions of law:

Claimant suffered a compensable claim and proceeded to try his case before the Administrative Law Judge in 2006. That trial resulted in an Award that was issued on June 6, 2007 granting claimant a 10 percent permanent partial impairment to body as a whole as well as a 61.5 percent permanent partial general (work) disability. The 61.5 percent finding was based upon a 23 percent task loss and a 100 percent wage loss. But because claimant obtained a job paying a comparable wage in December of 2006, he was not entitled to receive any work disability benefits and his recovery was limited to the 10 percent functional impairment for that period he was employed at a comparable wage.²

Approximately 2 months after the Award was issued, claimant’s employment with his subsequent employer was terminated. The parties offered into evidence a written

¹ SALJ Order (Feb. 13, 2008).

² K.S.A. 44-510e(a).

document that indicates claimant was terminated on June 11, 2007 and that his termination was “involuntary” and “based on poor performance.” Claimant testified that it was his employer’s poor business performance that explained their decision to terminate his employment. On the other hand, respondent argues that it was claimant’s poor performance that justified his termination. Other than the letter, however, there was no evidence to support this argument. And there is nothing but claimant’s testimony that sheds any additional light on the reasons behind claimant’s “involuntary” termination, nor explanation for the “poor performance”.

Since his termination, claimant has sought subsequent employment but has not yet been successful. He continues to receive unemployment benefits and testified that he is actively looking for employment in his area of Southeast Kansas, searching for a job on a daily basis. Claimant testified that he kept a log of his job contacts and agreed to produce that document but it is not contained within the record. Indeed, respondent contends that claimant “failed” to produce any such writing to evidence his job search efforts and that this failure demonstrates a lack of good faith effort to find post-injury employment.

Claimant has job restrictions which have kept him from applying for work that he has done in the past but that he is now trying to find work in other areas.³ He is looking for any work that does not require physical labor and he reserves the issue of his restrictions for later discussion. He has received no offers of employment as of the date of his regular hearing.

An award may be modified when changed circumstances either increase or decrease the permanent partial general disability. The Workers Compensation Act provides, in part:

Any award or modification thereof agreed upon by the parties, except lump-sum settlements approved by the director or administrative law judge, whether the award provides for compensation into the future or whether it does not, may be reviewed by the administrative law judge for good cause shown upon the application of the employee, employer, dependent, insurance carrier or any other interested party. In connection with such review, the administrative law judge may appoint one or two health care providers to examine the employee and report to the administrative law judge. The administrative law judge shall hear all competent evidence offered and if the administrative law judge finds that the award has been obtained by fraud or undue influence, that the award was made without authority or as a result of serious misconduct, that the award is excessive or inadequate or that the functional impairment or work disability of the employee has increased or diminished, the administrative law judge may modify such award, or reinstate a prior award, upon

³ R.M.H. Trans. at 8-9.

such terms as may be just, be increasing or diminishing the compensation subject to the limitation provided in the workers compensation act.⁴

K.S.A. 44-528 permits modification of an award in order to conform to changed conditions.⁵ If there is a change in the claimant's work disability, then the award is subject to review and modification.⁶

In a review and modification proceeding, the burden of establishing the changed conditions is on the party asserting them.⁷ Our appellate courts have consistently held that there must be a change of circumstances, either in claimant's physical or employment status, to justify modification of an award.⁸

Respondent makes an interesting argument here, asserting that under K.S.A. 44-528(b) the standard for modifying an award based on a wage loss in a review and modification matter is different than under K.S.A. 44-510e(a).

When a claim is initially tried and the claimant (as here) has an unscheduled injury, his permanency is determined based upon K.S.A. 44-510e(a) which provides:

Permanent partial general disability exists when the employee is disabled in a manner which is partial in character and permanent in quality and which is not covered by the schedule in K.S.A. 44-510d and amendments thereto. **The extent of permanent partial general disability shall be the extent, expressed as a percentage, to which the employee, in the opinion of the physician, has lost the ability to perform the work tasks that the employee performed in any substantial gainful employment during the fifteen-year period preceding the accident, averaged together with the difference between the average weekly wage the worker was earning at the time of the injury and the average weekly wage the worker is earning after the injury.** In any event, the extent of permanent partial general disability shall not be less than the percentage of functional impairment. Functional impairment means the extent, expressed as a percentage, of the loss of a portion of the total physiological capabilities of the human body as established by competent medical evidence and based on the fourth edition of the American Medical Association Guides to the Evaluation of

⁴ K.S.A. 44-528.

⁵ *Nance v. Harvey County*, 263 Kan. 542, Syl. ¶ 1, 952 P.2d 411 (1997).

⁶ *Garrison v. Beech Aircraft Corp.*, 23 Kan. App. 2d 221, 225, 929 P.2d 788 (1996).

⁷ *Morris v. Kansas City Bd. of Public Util.*, 3 Kan. App. 2d 527, 531, 598 P.2d 544 (1979).

⁸ See, e.g., *Gile v. Associated Co.*, 223 Kan. 739, 576 P.2d 663 (1978); *Coffee v. Fleming Company, Inc.*, 199 Kan. 453, 430 P.2d 259 (1967).

Permanent Impairment, if the impairment is contained therein. **An employee shall not be entitled to receive permanent partial general disability compensation in excess of the percentage of functional impairment as long as the employee is engaging in any work for wages equal to 90% or more of the average gross weekly wage that the employee was earning at the time of the injury.** (Emphasis added.)

But that statute must be read in light of *Foulk*⁹ and *Copeland*.¹⁰ In *Foulk*, the Kansas Court of Appeals held that a worker could not avoid the presumption against work disability as contained in K.S.A. 1988 Supp. 44-510e(a) (the predecessor to the above-quoted statute) by refusing an accommodated job that paid a comparable wage. In *Copeland*, the Kansas Court of Appeals held, for purposes of the wage loss prong of K.S.A. 44-510e(a) (Furse 1993), that a worker's post-injury wage should be based upon the ability to earn wages rather than actual earnings when the worker failed to make a good faith effort to find appropriate employment after recovering from the work-related accident.

If a finding is made that a good faith effort has not been made, the factfinder *[sic]* will have to determine an appropriate post-injury wage based on all the evidence before it, including expert testimony concerning the capacity to earn wages.¹¹

In contrast, once a claim has been decided and one party requests a post-award modification to reflect a change in circumstances, K.S.A. 44-528 governs that procedure. That statute provides as follows:

If the administrative law judge finds that the employee has returned to work for the same employer in whose employ the employee was injured or for another employer and is earning or is capable of earning the same or higher wages than the employee did at the time of the accident, or is capable of gaining an income from any trade or employment which is equal to or greater than the wages the employee was earning at the time of the accident . . . the administrative law judge may modify the award and reduce compensation or may cancel the award and end the compensation.

Obviously, the review and modification statute speaks to whether claimant is "capable" of earning the same or greater wages while the general statute dealing with work disability utilizes a formula that uses an average of a task loss and a wage loss, coupled with a "good faith" analysis. If respondent is correct and the only question is whether, in this review and modification proceeding, claimant is "capable" of earning the same or

⁹ *Foulk v. Colonial Terrace*, 20 Kan. App. 2d 277, 887 P.2d 140 (1994), rev. denied 257 Kan. 1091 (1995).

¹⁰ *Copeland v. Johnson Group, Inc.*, 24 Kan. App. 2d 306, 944 P.2d 179 (1997).

¹¹ *Id.* at 320.

greater wages, then claimant may not be entitled to a modification of his award for work disability because there is evidence that he is capable of working and earning a wage equal to or in excess of his preinjury employment. However, if K.S.A. 44-510e(a) applies (as it did in the original hearing), then a good faith test must be implemented.¹² And if claimant's good faith is established, then his actual wage loss (100 percent) is used and he would be entitled to 61.5 percent work disability.

Both vocational experts who testified in the original hearing testified that claimant is capable of earning a wage that exceeds his preinjury average weekly wage. But because claimant had sought and found appropriate post-injury employment that paid him a wage in excess of his preinjury average weekly wage, his recovery was limited to his functional impairment. Nonetheless, his 23 percent task loss and 100 percent wage loss (for those periods he was unemployed) were made findings of fact and were not appealed.

Now post-award, he has lost his job, reviving the 100 percent wage loss. Claimant's preinjury average weekly wage was \$228.38 and at present, even a minimum wage job based on \$5.85 per hour translates to an average weekly wage of \$234. Yet, claimant testified that he continues to look for work on a daily basis. Although he did not produce a written document to substantiate his job search efforts, such a document (although extremely helpful) is not conclusive, nor needed in every instance. Claimant has demonstrated an obvious willingness to work post-injury and made efforts to satisfy the requirements necessary to qualify for unemployment. He itemized his efforts to find suitable employment at the post-award hearing and there is no evidence within this record that suggests his efforts were less than genuine. Thus, the Board concludes that he has established a good faith effort to find suitable post-injury employment.

In making this finding, this Board also concludes that the "poor performance" justification for claimant's termination does not defeat the good faith finding. Claimant testified that the business was doing poorly and that was the reason for his termination. The letter from his subsequent employer does not dispel that assertion, nor did any one contradict claimant's testimony on the meaning of that letter. The letter's allegation that claimant was terminated for "poor performance" is ambiguous. It does not explain whose "poor performance" was at issue, claimant's or the marketplace. The statement could speak to both or either as the source. Thus, claimant's testimony stands unchallenged on that issue. Moreover, even assuming his inability to perform the job in a satisfactory

¹² But see *Graham v. Dokter Trucking Group*, 284 Kan. 547, 161 P.3d 695 (2007), in which the Kansas Supreme Court held, in construing K.S.A. 44-510e, the language regarding the wage loss prong of the permanent disability formula was plain and unambiguous and, therefore, should be applied according to its express language and that the Court will neither speculate on legislative intent nor add something not there.

manner is not, standing alone, a finding that will defeat a work disability claim.¹³ The Board also notes that a lay off due to economic reasons justifies a work disability.¹⁴ The loss of job does not need to be due to the injury.

And while the evidence from the vocational experts suggests that claimant retains the ability to earn in excess of his pre-injury wage, and that the federal minimum wage would result in a full-time job earning more than his pre-injury wage, the Board finds that K.S.A. 44-510e(a) controls in this matter over the general language in K.S.A. 44-528. K.S.A. 44-510e(a) was amended more recently than K.S.A. 44-528 and reflects the legislature's most recent expression of its intent on how permanent partial general (work) disability awards are to be computed. Thus, the test is claimant's actual wage earnings if he had made a good faith job search not his wage earning ability.

K.S.A. 44-510e(a) requires the good faith analysis and when that is shown, the employee's actual wage loss is used to calculate the work disability.¹⁵ In this instance, that results in the reinstatement of the 61.5 percent work disability as it reflects the 23 percent task loss and a 100 percent wage loss. This 61.5 percent work disability is effectively reinstated as of March 16, 2005 (the date he lost his job).

AWARD

WHEREFORE, it is the finding, decision and order of the Board that the Order of Special Administrative Law Judge Marvin Applling dated February 13, 2008, is reversed and claimant's Award is hereby modified as follows:

Claimant's 61.5 percent work disability is hereby reinstated effective February 13, 2008 and is hereby payable as follows:

The claimant is entitled to 6.00 weeks of permanent partial disability compensation at the rate of \$152.26 per week or \$913.56 for a 10 percent functional disability followed by 249.23 weeks of permanent partial disability compensation at the rate of \$152.26 per week or \$37,947.76 for a 61.50 percent work disability, making a total award of \$38,861.32.

¹³ *Morris v. Rubbermaid Specialty Products*, No. 213,651, 1998 WL 695380, (Kan. WCAB Sept. 14, 1998).

¹⁴ *Helmstetter v. Midwest Grain Products, Inc.*, 29 Kan. App. 2d 278, 28 P.3d 398 (2001); *Lee v. Boeing Co.*, 21 Kan. App. 2d 365, 899 P.2d 516 (1995).

¹⁵ Again, the Board notes that this good faith analysis is somewhat in question given the Supreme Court's pronouncement that strict construction must prevail.

As of June 30, 2008 there would be due and owing to the claimant 177.86 weeks of permanent partial disability compensation at the rate of \$152.26 per week in the sum of \$27,080.96 for a total due and owing of \$27,080.96, which is ordered paid in one lump sum less amounts previously paid. Thereafter, the remaining balance in the amount of \$11,780.36 shall be paid at the rate of \$152.26 per week for 77.37 weeks or until further order of the Director.

IT IS SO ORDERED.

Dated this _____ day of June 2008.

BOARD MEMBER

BOARD MEMBER

BOARD MEMBER

c: William L. Phalen, Attorney for Claimant
Jeffrey R. Brewer, Attorney for Respondent and its Insurance Carrier
Marvin Appling, Special Administrative Law Judge
Thomas Klein, Administrative Law Judge